APPENDIX A

Section 4(b) of the Boulder Canyon Project Act of 1928, 43 U.S.C. 617c, 45 Stat. 1058, provides as follows:

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

Section 5 of the Boulder Canyon Project Act of 1928, 43 U.S.C. 617d, 45 Stat. 1060, provides as follows:

That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate

fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for.

In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act[*] as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however*, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary,

* Section 7 of the Federal Power Act, 16 U.S.C.A. 800 provides as follows:

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Regulation V of the Secretary of the Interior for the lease of power at the Boulder Canyon Project, April 25, 1930, provides as follows:

V

The following allocation of energy is made: (the percentages stated being percentages of the total firm energy available) subject, however, to the conditions hereinafter stated:

Of Firm Energy

A. To the State of Nevada, for use in Nevada, not exceeding eighteen per centum (18%) of said total firm energy.

B. To the State of Arizona, for use in Arizona, not exceeding eighteen per centum (18%) of said total firm energy.

Should either of the States not take its full eighteen per centum (18%) allocation within a period of twenty (20)

years hereof, the other may then contract for the energy not so taken up to four per centum (4%) of the total firm energy, provided that the combined amount used by the two states shall not, at any time, exceed thirty-six per centum (36%) of such total firm energy.

C. To the Metropolitan Water District of Southern California (hereinafter referred to as the District) so much energy as may be needed and used for pumping Colorado River Water into and in its Aqueduct for the use of such District within the following limits:

(1) Not exceeding thirty-six per centum (36%) of said total firm energy; plus

(2) All secondary energy developed at the Boulder Dam power plant as provided in these regulations; plus

(3) So much of the firm energy allocated to the States, the City and the Company as may not be in use by them. Energy allocated to the States but not in use by them shall be released to the District by the two lessees equally (unless they agree upon a different ratio) as follows:

(a) If the District makes a firm contract with the Secretary for the balance of the lease period for part or all of such unused States energy (subject to the first right of the States thereto) such contract shall be made effective upon two years' written notice to the Secretary, and compensation to the lessees, respectively, for main transmission line property rendered idle;

(b) If the District does not so make a firm contract for such energy, then energy allocated to the States but not in use by them, shall be released to the District upon not less than fifteen (15) months' written notice to the Secretary and at such compensation as the District and such lessees, respectively, may agree upon, to cover cost and overhead of replacing energy which otherwise would have been received at the Pacific Coast end of the main transmission lines by the lessees, respectively. Such cost shall include interest on and depreciation and operation and maintenance of the plant capacity while required for the generation of such substitute energy; and also appropriate allowance for interest on and maintenance and depreciation of plant capacity rendered idle because of cessation of generation of such substitute energy until such time

as such plant capacity would otherwise have been installed by the lessees, respectively, for their own requirements. If the District and the respective lessees fail to agree on such compensation, such energy shall nevertheless be released to the District, and the disagreement shall be determined by arbitration or as may be provided in the respective contracts of the parties with the Secretary. Such determination shall include allowance for items of cost and overhead as specified in this paragraph. Pending such determination, energy so released shall be paid for by the District at the rate for firm energy but the determination of compensation shall not be controlled by such rate. During any year beginning June first, the District shall not use any secondary energy nor any unused State energy, until it has first used subsequent to June first, next preceding, an amount of firm energy equivalent to one-twelfth of the amount of firm energy it is obligated to take and/or pay for annually multiplied by the number of months elapsed since June first next preceding.

(4) If, due to temporary deficiency in secondary energy regularly used by the District substitute energy is requested by the District in excess of the energy made available under the foregoing sub-paragraph (3) (b) the City and/or the Company may release so much energy as may be practicable on the same terms as provided in sub-section (3) (b) preceding.

D. To the municipalities of

	Percent
Pasadena	1.6183
Glendale	1.8867
Burbank	.5896
Total	4.0946

(NOTE—Amendments of March 10, 1931 and July 1, 1931, extended the date for submission of an allocation to July 15 and November 16, 1931, respectively. An agreement having been submitted to the Secretary whereby only the above municipalities elected to contract, in the amounts above stated, and the other municipalities named in regulations of April 25, 1930, i.e., Anaheim, Beverly Hills, Colton, Fullerton, Newport Beach, Riverside, San Bernardino and Santa Ana, withdrew, the allocation under

subsection D is amended as above, effective November 16, 1931.)

E. To the City of Los Angeles, 14.9054% (being 13% as provided in regulations of April 25, 1930, plus 1.9054%, which is the balance of 6% allocated the municipalities by regulations of said date and not applied for by them pursuant to subsection D as amended).

(NOTE—Amended as above, effective November 16, 1931. See note under subsection D.)

F. To

	Percent
Southern California Edison Co. Ltd.	7.2
Southern Sierras Power Co.	.9
Los Angeles Gas & Electric Corp.	.9

(NOTE—Amended as above, effective November 16, 1931, to accord with allocation agreement submitted pursuant to subsection F a promulgated in regulations of April 25, 1930, time having been extended to July 15, 1931 by amendment of March 10, 1931, and to November 16, 1931 by amendment of July 1, 1931.)

The foregoing allocations are subject to the following conditions:

(i) So much of the energy allocated to the States (thirty-six per centum (36%) of firm energy) and not in use by them, or, failing their use, by the District for the above purposes, shall be taken and paid for one-half by the City and one-half by the following allottees in the ratio stated below:

	Percent
Southern California Edison Co. Ltd.	80
Los Angeles Gas and Electric Corp.	10
Southern Sierras Power Co.	10

(NOTE—Amended as above, effective November 16, 1931, to accord with an allocation agreement submitted in accordance with subsection F as promulgated in regulations of April 25, 1930, time having been extended to July 15, 1931 by amendment of March 10, 1931, and to November 16, 1931 by amendment of July 1, 1931.)

(ii) So much of the energy allocated to the municipalities by regulations of April 25, 1930 (6%) as has been relinquished by them (1.9054%), and so much of the energy contracted for by them (4.0946%), as is not used by them directly or under contract for municipal purposes and/or distribution to their inhabitants, shall be taken and paid for by the City (without, however, impairing the obligation of said municipalities to the United States to take and pay for energy contracted for by them, respectively).

(NOTE—Amended as above, effective November 16, 1931, to accord with an allocation agreement and elections thereunder submitted in accordance with subsection D. See note under subsection D.)

(iii) So much of the energy allocated to the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company, and the Los Angeles Gas and Electric Corporation by regulations of April 25, 1930, as has not been or is not contracted for by them shall be taken and paid for by the Southern California Edison Company, Ltd.

(NOTE—Amended as above, effective November 16, 1931.)

(iv) If any allottee is permitted by the United States to divert water from the reservoir at a time when the reservoir is not spilling, in consequence of which the amount of energy which would have been utilized is diminished, such diminution, to such extent as may be provided in the contract, shall be debited to the allocation of firm energy herein made to such allottee; and charge for the energy equivalent of such diversion shall be made, and the amount of energy which the allottee shall otherwise be obligated to take and pay for hereunder shall be correspondingly reduced.

The reservoir shall be considered as spilling whenever water is being discharged in excess of the amount used for the generation of power, whether such waste occurs over the spillway or otherwise.

(v) Each of the States of Arizona and Nevada may, from time to time within the period of the aforesaid lease, contract for energy for use within such State in any amount until the total allocated, respectively, to each is in use as provided above; and may terminate such contract, or

contracts; without prejudice to the right to again contract for such energy. All such contracts shall be executed with the Secretary. A contract requiring one thousand (1,000) horsepower (of maximum demand) or less may become effective or be terminated on six months' written notice of requirement or termination given the Director by the State; provided, that the notice given shall be two years if in the twelve months preceding said notice of demand the total increment to such State has exceeded five thousand (5,000) horsepower of maximum demand or if in the twelve months preceding said notice of termination the decrement to such State has exceeded five thousand (5,000) horsepower of maximum demand. In all cases the Director shall immediately transmit such notice to each lessee. Whenever the amount in use is in excess of five thousand (5,000) horsepower of maximum demand, the lessees and other allottees respectively shall be compensated for property rendered idle by use of such excess in such amount as the Secretary shall determine to be equitable.

Firm energy not contracted for by the States shall be available for use by the District as herein elsewhere provided, and if not in use by the States and/or the District, shall be taken and paid for one-half by the City and one-half as follows: By the Southern California Edison Company, Ltd., 80% of said one-half; by the Southern Sierras Power Co., 10% of said one-half; and by the Los Angeles Gas and Electric Corporation, 10% of said one-half.

(NOTE.—Amended as above, effective November 16, 1931, to accord with an allocation agreement submitted pursuant to sub-section F; see note thereunder. Also, regulations of April 25, 1930, provided for contingencies in event a State should make a firm contract under section 5c of the Boulder Canyon Project Act in lieu of accepting the allocation therein made. As the time for execution of such a firm contract under section 5c of that act has expired by the limitation stated in the act the balance of this paragraph as originally promulgated is revoked, effective November 16, 1931.)

Of Secondary Energy

The District shall have the right to purchase and use all secondary energy as provided in these regulations for the purposes stated in the first paragraph of subdivision C of

this article. The City shall have the right to purchase and use one-half, and the allottees named in subsection F shall have the right to purchase and use a total of one-half (in the proportions in which they share the obligations assumed under subsection "v" as to unused State allocations) of such secondary energy as is not used by the District. Any such energy not used by one lessee shall be available, for the time being, to the other. To the extent that secondary energy is not taken as aforesaid, then and in such event, the United States reserves the right to take, use and dispose of such energy, from time to time, as it sees fit, giving credit therefor as provided in these regulations.

(NOTE—Modified as above, effective November 16, 1931, an allocation agreement having been submitted by the allottees named in subsection F whereby the obligation of the Southern California Edison Co., Ltd., under subsection "v", and its conditional rights to secondary energy under this paragraph, were both shared in the same ratio as the allocation of firm energy among them under subsection F. See note under subsections F and "v.")

Of Firm Energy Allocated to but Not Used by the District

In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then no disposition shall be made of such firm energy by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated.

In the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take.

Of Firm Energy not Disposed of In the Foregoing Allocations

In case the dam which the United States erects provides a maximum water surface elevation in excess of one thousand two hundred twenty-two (1,222) feet above sea level (United States Geological Survey datum), and thereby increases the quantity of firm energy above the quantity of four billion two hundred forty million (4,240,000,000) kilowatt-hours allocated above, said additional firm energy shall be generated, taken and paid for by the City on the same terms and conditions as other firm energy under its contract, but without prejudice to the foregoing allocations or to the contractual rights of other allottees.

(NOTE.—Regulations promulgated April 25, 1930, reserved to the Secretary the right to contract with any municipality for this additional energy on or before April 15, 1931, and provided that energy not so contracted for should be taken and paid for by the City. This time was extended to July 15, 1931 by amendment of March 10, 1931, and to November 16, 1931 by amendment of July 1, 1931. No such contract having been applied for, this subsection is amended as above, effective November 16, 1931.)

Section 1 of the Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618, provides as follows:

That the Secretary of the Interior is hereby authorized and directed to, and he shall, promulgate charges, or the basis of computation thereof, for electrical energy generated at Boulder Dam during the period beginning June 1, 1937, and ending May 31, 1987, computed to be sufficient, together with other net revenues from the project, to accomplish the following purposes:

(a) To meet the cost of operation and maintenance, and to provide for replacements, of the project during the period beginning June 1, 1937, and ending May 31, 1987;

(b) To repay to the Treasury, with interest, the advances to the Colorado River Dam Fund for the project made prior to June 1, 1937, within fifty years from that date (excluding advances allocated to flood control by section 2 (b) of the Project Act, which shall be repayable as provided in section 7 hereof), and such portion of such advances made

on and after June 1, 1937, as (on the basis of repayment thereof within such fifty-year period or periods as the Secretary may determine) will be repayable prior to June 1, 1987 . . .

* * * * * * * * * *

Section 8 of the Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618g, 54 Stat. 777, provides as follows:

The Secretary is hereby authorized from time to time to promulgate such regulations and enter into such contracts as he may find necessary or appropriate for carrying out the purposes of this Act and the Project Act, as modified hereby, and, by mutual consent, to terminate or modify any such contract: *Provided, however,* That no allotment of energy to any allottee made by any rule or regulation heretofore promulgated shall be modified or changed without the consent of such allottee.

Section 11 of the Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618j, 54 Stat. 778, provides as follows:

Any contractor for energy from the project failing or refusing to execute a contract modifying its existing contract to conform to this Act shall continue to pay the rates and charges provided for in its existing contract, subject to such periodic readjustments as are therein provided, in all respects as if this Act had not been passed, and so far as necessary to support such existing contract all of the provisions of the Project Act shall remain in effect, anything in this Act inconsistent therewith notwithstanding.

Regulation 4 of the 1941 General Regulations for Generation and Sale of Power in Accordance with the Boulder Canyon Project Adjustment Act provides in part as follows:

4. ALLOCATION OF ENERGY

(a) *Firm energy*

Firm energy shall be allocated as follows:

Allottee	Percentage	Use by allottee restricted to following
State of Nevada	17.6259	In Nevada only.
State of Arizona	17.6259	In Arizona only.
Metropolitan Water District of Southern California (hereinafter called the District).	35.2517	Pumping Colorado River water into and in its aqueduct.
City of Burbank	.5773	
City of Glendale	1.8475	
City of Pasadena (the three last above-named cities are hereinafter called the "municipalities").	1.5847	
City of Los Angeles	17.5554	
Southern California Edison Company Ltd.	7.0503	
The Nevada-California Electric Corp.	.8813	
	100.0000	

(iv) In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it, then the Secretary shall dispose of such unused energy until required by the District, crediting on the District's obligation the proceeds of such disposition as received; provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to the City, the Company and The Nevada-California Electric Corporation the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for such energy, in the same proportion, and subject to the same rights with respect to proportions thereof not taken by others, as in the case of secondary energy. The rights of the City, the Company and The Nevada-California Electric Corporation so to contract shall be deemed to have been waived unless, within 30 days after offer by the Secretary of such opportunity, such offer is accepted.

APPENDIX B

Opinion of the Court of Claims Dated March 6, 1957

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1957)

No. 364-55

CITIZENS UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

No. 381-55

CALIFORNIA-PACIFIC UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

Mr. Arthur S. Friedman, for the plaintiff in No. 364-55. *Messrs. Milton S. Gould, Ellis Lyons*, and *Gallop, Climenko & Gould* were on the briefs.

Mr. Ezekiel G. Stoddard, for the plaintiff in No. 381-55. *Messrs. Arnold M. Lerman* and *Cox, Langford, Stoddard & Cutler* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Messrs. Francis J. Robinson* and *Gerson B. Kramer* were on the brief.

Mr. John H. Mathews for the City of Los Angeles. *Messrs. Roger Arnebergh, Gilmore Tillman*, and *Ely, McCarty and Duncan* were on the brief.

Mr. Edmund L. Jones for the Southern California Edison Company. *Messrs. Arthur J. Phelan, Paul R. Con-*

nolly, Bruce Renwick, and *Harry W. Sturges, Jr.* were on the brief.

Mr. Edmund L. Jones for California Electric Power Company. *Messrs. Henry W. Coil* and *Donald J. Carman* were on the brief.

Mr. James H. Howard for The Metropolitan Water District of Southern California. *Messrs. Donald M. Keith* and *John W. Dickey* were on the brief.

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiffs sue the United States for damages because the United States refused to renew their contracts for electrical energy produced at the Hoover Dam on the Colorado River. The two suits have been consolidated since they involve the same isues. The four "third parties" were brought into the case on notices, requested by the United States and issued by the court pursuant to its Rule 19. The facts in the cases appear from undisputed documents, and the cases are suitable for decision on motion for summary judgment.

The Boulder Canyon Project Act, 45 Stat. 1057, enacted in 1928, authorized the construction and operation of Boulder Canyon Dam and related facilities. But the Act required that, before any appropriations were made or any construction was commenced, the Secretary of the Interior should obtain contracts which would bring the United States enough revenue to repay it, with interest, within 50 years, the money proposed to be advanced by the United States for the construction of the dam, together with all expenses of operation and maintenance. The Secretary on April 26, 1930, entered into a contract with the City of Los Angeles and Southern California Edison Company, Ltd., hereinafter called, respectively, City and Edison, which are two of the third parties in this suit. Under this contract City and Edison were made, severally, lessees of parts of the proposed dam and the power plant machinery, their two parts constituting the whole, and they were obligated to generate, at cost, electrical energy for themselves and for others with whom contracts would be made. City and Edison also agreed to be responsible for paying for 64 percent of the energy

produced at the dam, subject, however, to the rights of the States of Arizona and Nevada to take large amounts of this 64 percent allotment when and if they so desired, and subject to the rights of several municipalities in Southern California to take 6 percent of this allotment if they made contracts to do so within a specified time. The allotments of City and Edison, amounting in all to 64 percent, were several, but the detailed percentages of their obligations are not relevant here. But they were obliged, between them, to take and/or pay for all of the 64 percent if no other entity exercised its option to take a part of it.

The Secretary of the Interior reported to Congress that the City-Edison contract was sufficient by itself to provide revenues to pay for the project.

On April 26, 1930, the date of the City-Edison contract, the Secretary also made a contract with the Metropolitan Water District of Southern California, herein called Water District. It is one of the third parties in these suits. Water District was obligated, by its contract, to take and/or pay for 36 percent of the energy generated at the dam. Water District wanted the energy to pump Colorado River water into the aqueduct which it proposed to build from the dam to the City of Los Angeles. City and Edison wanted to be certain that Water District did not use any of the energy which it bought to compete with them in the electrical utility business in their areas. The Secretary therefore inserted in Water District's contract a provision that it could use the energy only for pumping water into its proposed aqueduct. That restriction created the possibility that Water District might have to pay for a lot of energy that it could not use. Water District's contract provided, in that regard, that the Secretary might dispose of Water District's unused energy by first offering it to City and Edison and, if they did not buy it, selling it to others.

The municipalities in California which had options to take, in all, 6 percent of City's allotment exercised their options within the time specified, and the Secretary executed contracts with them in 1931. In 1936, before the dam was completed, the State of Nevada chose to take a part of the 18 percent on which it had an option, and the Secretary made a contract with it.

Water District's obligation to begin to take and/or pay for its 36 percent was to become effective when two billion kilowatt hours of energy per annum became available. When that time approached in 1937, Water District advised the Secretary that there would be surplus energy available for resale and that that condition would exist until the end of 1954. The Secretary advised City and Edison that the surplus energy was available, but they did not exercise their options to take it. The plaintiffs negotiated with the Secretary and with Water District, which would be the beneficiary of the resale contracts if made. Ten-year contracts were at first considered, but the plaintiff Citizens thought this was too short a period for it to recover the investment which it would have to make in building a transmission line from the dam to Kingman, Arizona, in order to use the power from the dam. It was then decided that the contracts should run to December 31, 1954, and they were so written. The contracts bound the plaintiffs to take and pay for only a small proportion of the energy which they had the right to take and pay for at their option.

The parties proceeded according to the contracts, and the plaintiffs received the part that they were entitled to, and chose to take, of Water District's surplus. On May 31, 1945, the Secretary made a contract with City and Edison, among others, which, the defendant says, conveyed to those contractors all of Water District's unused energy, including that which the plaintiffs were getting under their contracts, but, as to that latter amount, the sale not becoming effective until the end of the plaintiffs' contracts on December 31, 1954.

The plaintiffs, when the termination dates of their contracts approached, applied to the Secretary for renewals of their contracts. These applications were rejected, and the plaintiffs have received no electrical energy under their contracts since shortly after the date of expiration of their contracts. They claim to have been heavily damaged by the Secretary's refusal to renew their contracts, and sue here for those damages. They base their claim upon section 5 (b) of the Boulder Canyon Project Act which says:

> The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal

> thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

The plaintiffs say, correctly, that they were the holders of contracts for electrical energy, and were not in default under their contracts. Therefore, they say, the statute applied to them. The Government says that the plaintiffs read the statute too literally, and thereby miss its meaning. The Government says that statute intended to grant the renewal privilege only to those who, in effect, underwrote the project, by binding themselves to take and/or pay for electricity from the project at a time when such promises were a condition precedent to the appropriation of money for and the building of the project. It says that entities like the plaintiffs, who made contracts only for surplus energy available for resale, and whose contracts were for relatively short periods, were not intended to be covered by the renewal provision.

The plaintiffs find flaws in the Government's "underwriters" argument. They point out that although Water District made its contract, on the same day that City and Edison made theirs, to take and/or pay for 36 percent of the energy produced, Water District at that time was a new corporation, not yet financed, and the Secretary, in reporting to Congress that sufficient revenues were assured by contracts, did not include Water District's contract as an asset. They point out that the several municipalities in Southern California which had what were, in effect, options to take a part of the energy contracted for by City, were not underwriters of the project, because before they made their contracts, City had already obligated itself to pay for the energy which they later contracted for. Yet their contracts, when made, contained express renewal provisions. The same seems to have been true of contracts later made by the Secretary with the States of Arizona and Nevada.

If there is any valid distinction between the contracts of the plaintiffs and those of other entities whose contracts did give them renewal rights, it would seem to be that the plaintiffs' contracts covered only surplus energy, disposed of by the Secretary because the one who had contracted to pay for it had no use for it. Is this difference sufficient to deprive these contracts of the renewal privilege written into section 5 (b) of the Project Act?

The plaintiffs' contracts contained no provision for renewal. When Water District advised the Secretary that it would have surplus energy for disposal, it said that that would be true until the end of 1954. When the plaintiffs applied to the Secretary in 1937 for some of this surplus, they apparently had no thought of any right of renewal. They say, and apparently correctly, that the information which they had, indicated that the subject matter of their proposed contracts, i. e., surplus energy in Water District's allotment, would not exist after 1954. If the failure of the plaintiffs to insist on, or even think about, a right of renewal were urged, which it is not, as a waiver of their statutory rights under section 5 (b), the circumstances might well rebut any inference of an intent to waive.

By the year 1945, Water District had apparently decided that it would have surplus energy for all the rest of the term of its 50-year contract. The situation was acute at that time because a defense plant which had been taking and paying for a large amount of Water District's surplus energy, had closed down. By that time, City and Edison were willing to agree to take Water District's surplus energy, which they had not been willing to do in 1937. So the 1945 contract was made. As we have said, the Government says that that contract intended to include, after 1954, the energy that the plaintiffs had been getting. The plaintiffs say that the 1945 contract did not include the energy which they would continue to be entitled to if their contracts were renewed.

The question of what was intended by the 1945 contract has caused great concern to the Government, of course, since if it did include the energy which the plaintiffs had been getting, and if the plaintiffs had a statutory right to renewal, the Government was in the position of having

sold the same thing to different parties. But we think that the intention of the Government and the third parties, when they made the 1945 contract, is not conclusive, and indeed is scarcely relevant, so far as the plaintiffs are concerned. We do not, therefore, undertake to determine the intent of the 1945 contract. We note that the Government's officials had great difficulty in making up their minds as to its intent.

The plaintiffs say that the only authority which the Secretary had for the sale of electrical energy was given him in section 5 of the Project Act; that section 5 says that in making contracts for the sale of energy, section 5 (b) *inter alia*, shall govern; that section 5 (b) is the renewal privilege section; that in several places in the plaintiffs' contracts there were statements that the contracts were made pursuant to the Project Act. They urge, therefore, that they are entitled to the benefits of the statute. They further say that the equity of the statute providing for the renewal privilege makes it applicable to them. It was intended to protect those who had invested in facilities to use or distribute electricity from the dam, and customers who had become dependent upon the continued flow of that electricity. The plaintiffs say, and it would seem to be true, that these facts existed in their situations.

The Government points to the fact that the plaintiff Citizens represented to the Arizona Corporation Commission that it should be allowed to write off its investment in facilities to transmit energy from the dam during the 15-year period of its contract, and says that this shows that that plaintiff did not count on a renewal privilege. We have already discussed the reasons why the plaintiffs may not have thought that there would be a renewal of their contracts.

The applications of the plaintiffs for renewal were rejected by the Secretary in 1952. They persisted in their applications, and on March 2, 1954, the Secretary offered them, in writing, extensions of their contracts to May 31, 1987. They accepted these offers in writing, but the Secretary ultimately refused to execute formal documents of renewal, and they have received no electrical energy since early in 1955. The plaintiff Citizens bases its claim,

in the alternative, upon the renewal of its contract which, it says, was accomplished by the correspondence just referred to. In view of our conclusion upon the whole case, we do not decide this question.

The Government argues that the Secretary, in his dealings with the plaintiffs, was not acting for the United States, but for Water District. It is true that the primary benefit of the sale of Water District's unused energy inured to Water District, because the price received for it was credited to Water District's account. The contract with Water District might have provided that it could market its own unused energy, so long as it did not send it to the area where it would compete with City and Edison. But the Government did not choose to have other persons selling Hoover Dam power at wholesale. Its contract with Water District carefully provided that the Government, through the Secretary, would be the one to do the selling, if it was done. The Secretary was not acting as an agent of Water District. He was acting for the United States, and was carrying out its policy of keeping the sale of power under its control. He was also furthering the interest of the United States in keeping Water District from being overwhelmed by its obligation to pay for power for which it had no use, and thereby, possibly, being disabled from carrying out its contract with the United States.

There is an apparent inconsistency in the position of the plaintiffs, in that they do not claim that their rights, under their renewals, would be as extensive as their rights under their original contracts. It will be remembered that their contracts gave them what were, in effect, options to take specified amounts of electricity, but only bound them to take and pay for much smaller amounts. Water District was willing, in 1937, to permit the Secretary to so contract because it was certain that there would be sufficient surpluses, until the end of 1954, to satisfy those contracts. But the contracts certainly contemplated that if Water District had no surplus after 1954, there would be nothing to sell as surplus to anyone. And they certainly would have contemplated, if it had occurred to the parties, that no extension of the contracts should deprive Water District of electricity which it needed for its own purposes. The plaintiffs claim only the rights

to renewals which would have given them such electricity, if any, as was surplus to Water District's needs after 1954, and was within the amounts set in their original contracts.

Our conclusion is that the plaintiffs were entitled, under the statute, to renewals of their contracts with the limitations which they concede, and that the Government violated their statutory rights when it denied them renewals and refused to give them the electrical energy to which renewals of their contracts would have entitled them.

The plaintiffs are entitled to recover, and judgment will be entered to that effect. The amounts of the judgments will be determined in further proceedings under Rule 38 (c).

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

APPENDIX C

Order Overruling Motions for Rehearing

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this fifth day of June, 1957, that said motions be and the same are overruled as follows:

* * * * * * * * * *

364-55 Citizens Utilities Company

381-55 California-Pacific Utilities Company

Defendant's motion and the motions by the third parties, City of Los Angeles and The Metropolitan Water District of Southern California.

BY THE COURT
/s/ MARVIN JONES
Marvin Jones
Chief Judge.

APPENDIX D

Order by Mr. Justice Harlan Extending Time in Which to File Petition for Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957

THE UNITED STATES
CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES, *Petitioners*

vs.

CITIZENS UTILITIES COMPANY AND CALIFORNIA-PACIFIC UTILITIES COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for the City of Los Angeles,

It is ordered that in so far as the City of Los Angeles has the right or standing to petition for writ of certiorari in the above-entitled cause, the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1957.

(S) John M. Harlan
Associate Justice of the Supreme Court of the United States.

Dated this twenty-ninth day of August, 1957.